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HEATHER FONG, IN HER OFFICIAL CAPACITY,
AND JESSE SERNA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY OLIVER, II,

Plaintiff,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, a municipal corporation;
HEATHER FONG, in her capacity as
Chief of Police for the CITY AND
COUNTY OF SAN FRANCISCO; JESSE
SERNA, individually, and in his capacity
as a police officer for the CITY AND
COUNTY OF SAN FRANCISCO; and
San Francisco police officers DOES 1-25,
inclusive,

Defendants.

Case No. C07-02460 JL

**REPLY BRIEF IN SUPPORT OF
MOTION TO BIFURCATE *MONELL*
CLAIMS AND TO STAY *MONELL*
DISCOVERY**

Hearing Date: May 21, 2008
Hearing Judge: Hon. J. Larson
Time: 9:30 a.m.
Place: Courtroom F

Date Action Filed: May 8, 2007
Trial Date: None Set

I. INTRODUCTION

In their opening brief, Defendants explained why it makes sense to bifurcate Plaintiff's *Monell* claim and to stay *Monell* discovery. *Monell* discovery is likely to be of little value, because the *Monell* claim will almost certainly be moot after trial of the underlying constitutional claims against Officer Serna. If Officer Serna is found liable, Plaintiff will be awarded damages and will receive no additional damages based on his *Monell* claim. If Officer Serna is exonerated, Plaintiff's *Monell* claim will have no merit.

Yet, despite its low value to the case, *Monell* discovery may impose significant burdens on Defendants in terms of the time and expense involved in collecting materials relating to practice and custom. Moreover, *Monell* discovery will infringe on Officer Serna's well-founded privacy rights and will unfairly prejudice him at trial by subjecting him to character evidence unrelated to this case. Plaintiff ignores Officer Serna's privacy rights almost entirely and treats this material as if it were normal discovery. Yet, personnel files are not normal discovery and are not subject to the fishing expedition that Plaintiffs are proposing to conduct.

Plaintiffs' opposition does not effectively address any of these issues. Instead, Plaintiffs speculate about what could possibly be in Officer Serna's personnel files and admit that their ultimate strategy is to build a *Monell* case that will allow them to renew their already-rejected motion to consolidate the various lawsuits against Officer Serna — lawsuits that are unrelated to each other and whose consolidation will serve no purpose other than to smear Officer Serna and to import into the trial the media feeding frenzy (and resulting lawsuit feeding frenzy) that developed once the *San Francisco Chronicle* began to focus on Officer Serna with a series of articles.

Because the value of this discovery is low and because its costs are high, the Court should grant the motion, bifurcate the *Monell* claim, and stay *Monell* discovery.

II. PLAINTIFF'S OPPOSITION PROVIDES NO REASON TO DENY THE MOTION.

A. Plaintiffs Barely Dispute The Low Value Of The *Monell* Discovery And The Fact That The *Monell* Claim Is Almost Certain To Be Moot.

Plaintiffs spend considerable time in their opposition describing how various types of discovery could be relevant to their *Monell* claim. This, however, is beside the point. Yes, various

1 forms of discovery could be relevant to a *Monell* claim. However, requiring defendants to gather
2 such discovery could be a burdensome and very expensive process. The question is whether it
3 makes sense to conduct expensive and intrusive *Monell* discovery and try the *Monell* claim now —
4 even if it will likely be moot — or whether it makes better sense to defer the *Monell* claim until after
5 we know whether it will be moot.

6 And, as described in the opening brief, this *Monell* claim is almost certain to be moot. If the
7 jury finds that Officer Serna did not violate Plaintiff's constitutional rights, the case will be over, and
8 the *Monell* claim will be dismissed, given that violation of a person's constitutional rights is a
9 necessary predicate to a *Monell* claim. If the jury finds that Officer Serna violated Plaintiff's
10 constitutional rights, the jury will award damages, and Plaintiff will not be entitled to additional
11 damages under his *Monell* claim, meaning that the claim will be moot. Either way, the *Monell* claim
12 adds nothing to Plaintiff's damages claim.

13 The only scenario in which the *Monell* claim will take on independent significance is if the
14 Court grants Officer Serna qualified immunity by finding that he violated Plaintiff's constitutional
15 rights but that he did not violate clearly established law. In that scenario, Officer Serna will have no
16 federal liability, but the City may end up being liable if Plaintiff is able to prove his *Monell* claim.
17 This possibility, however, does not warrant proceeding with the *Monell* claim at this point in time. It
18 is too early in the case to know if qualified immunity will be a viable defense for Officer Serna. If
19 Plaintiff is claiming — as he appears to be claiming — that Officer Serna arrested him and used
20 force on him for no reason whatsoever, then qualified immunity is unlikely to be a successful
21 defense. But, for now, we do not know. As the Court is aware, qualified immunity is most
22 commonly a defense raised on summary judgment. If the Court grants summary judgment to Officer
23 Serna on the basis of qualified immunity, then the Court can consider modifying its order and
24 permitting the *Monell* claim to proceed at that point in time.

25 Thus, Plaintiff's contention that Defendants are asking the Court to conduct two separate
26 trials, one on Officer Serna's liability and one on the City's *Monell* liability, is inaccurate. The
27 chances of two trial being necessary are slim to none. Given the very low chances of conducting
28 two trials, the very high costs of litigating the *Monell* claim, the significant prejudice to Officer

1 Serna of litigating the claim, and the tangible benefits of deferring discovery and trial of the *Monell*
2 claim, the Court should grant the motion.

3 **B. Defendants Have Provided Or Are Providing The Court With Potential Rule**
4 **404(b) Evidence For In Camera Review.**

5 Plaintiff argues that some *Monell* discovery may be relevant under Rule 404(b) as admissible
6 bad-acts evidence. Although Defendants believe that the requested personnel files are unlikely to be
7 admissible for this purpose, Defendants have provided the Court with Officer Serna's OCC files for
8 in camera review. Plaintiffs point to Officer Serna's Management Control Division (MCD) files, and
9 Plaintiffs are correct that these files should be submitted to the Court for in camera review for
10 purposes of Rule 404(b). Defendants now have submitted the MCD file to the Court.

11 But, beyond the OCC and MCD files, Officer Serna's personnel files are unlikely to be
12 pertinent to any claim other than the *Monell* claim. As a result, their discovery should be subject to
13 the requested stay. Plaintiffs repeatedly speculate that Officer Serna may have used drugs, steroids,
14 or engaged in other bad behaviors that would make the non-OCC, non-MCD personnel files
15 relevant. Plaintiffs have no basis to make these assertions, and speculation is not a basis to conduct a
16 fishing expedition into personnel files, particularly when disclosure of these files implicates Officer
17 Serna's privacy rights.

18 **C. Plaintiffs Admit That Their Goal Is To Consolidate This Case With Unrelated**
19 **Lawsuits And Thereby To Smear Officer Serna Before The Jury.**

20 Plaintiff admits (Opp. at 6:23-6:27) that their goal is to take *Monell* discovery in their three
21 unrelated lawsuits against Officer Serna and then to use their *Monell* claims to renew their already-
22 rejected motion to consolidate the three cases. The Court previously — and correctly — rejected
23 Plaintiff's transparent effort to consolidate the cases, which would have had no effect except to
24 maximize the chances of a jury verdict against Officer Serna by dragging him through the mud at
25 trial. Accordingly, the Court should disregard Plaintiff's assertion that they need *Monell* discovery
26 now so that they can move to consolidate the various cases for trial. Indeed, this assertion shows
27 what is really going on here — not a need to prove a *Monell* claim, but rather a desire to encourage
28 the jury to disregard the facts of this case (facts that are not flattering to Plaintiff) and to focus on
other cases.

1 **III. CONCLUSION**

2 Defendants respectfully request that the Court grant the motion.

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4 Dated: May 7, 2008

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10 -/s/- Scott D. Wiener

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